

# NOTES

## PROFIT RIGHTS AND CREDITORS' PRIORITIES AFTER A PARTNER'S DEATH OR RETIREMENT: SECTION 42 OF THE UPA\*

RETIRING partners or representatives of deceased partners often claim a share of profits from business subsequently undertaken by remaining members of the firm.<sup>1</sup> When a personal representative or a former partner has consented informally or by assignment, partnership agreement, or will to leave his investment in the business,<sup>2</sup> he generally has the option of sharing in

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\*Blut v. Katz, 13 N.J. 374, 99 A.2d 785 (1953).

1. Any retirement of a partner from a general partnership without violation of the partnership agreement dissolves the partnership. See, *e.g.*, *Fisher v. Fisher*, 83 Cal. App. 2d 357, 188 P.2d 802 (1948) (consent of all partners); *Murray v. Bateman*, 315 Mass. 113, 51 N.E.2d 954 (1943) (terminable at will partnership); *Ludlum v. Wagner*, 212 App. Div. 779, 209 N.Y. Supp. 540 (3d Dep't 1925) (same); UNIFORM PARTNERSHIP ACT § 31(1) (1949) (hereinafter cited as UPA).

Moreover, it is generally held that a withdrawal, even though in contravention of the partnership agreement, will dissolve the partnership. See, *e.g.*, *Atha v. Atha*, 303 Mich. 611, 6 N.W.2d 897 (1942); *Solomon v. Kirkwood*, 55 Mich. 256, 21 N.W. 336 (1884); UPA § 31(2). However, the partner wrongfully causing dissolution is liable for damages for breach of contract. *Burnstine v. Geist*, 257 App. Div. 792, 15 N.Y.S.2d 48 (1st Dep't 1939); UPA § 38(2) (a) (II). This note does not primarily deal with the problem of a wrongfully dissolved partnership.

A partner's death also dissolves a general partnership. *E.g.*, *Darcy v. Int. Rev. Comm'r*, 66 F.2d 581 (2d Cir. 1933); *Harmon v. Martin*, 395 Ill. 595, 71 N.E.2d 74 (1947); UPA § 31(4); CRANE, PARTNERSHIP 406-07 (1952).

Dissolution requires the remaining partners to wind up partnership affairs, unless there has been effective consent by the former partner or his personal representative to continuation of the business. *E.g.*, *Mellon v. Heiner*, 14 F. Supp. 424 (W.D. Pa. 1936); *Mosher v. Lount*, 29 Ariz. 267, 240 Pac. 1027 (1925); *Dial v. Martin*, 37 S.W.2d 166 (Tex. Civ. App. 1931); UPA § 38(1). "Winding up" refers to the liquidation of partnership assets, the payment of partnership debts, and the distribution to partners of the cash value of their partnership interests. See UPA § 29, Commissioner's Note; CRANE, PARTNERSHIP 429 (1952).

2. See *Hoyt v. Sprague*, 103 U.S. 613 (1881) (informally); *Adams & Co. v. Albert*, 155 N.Y. 356, 49 N.E. 929 (1898) (same); *In re Rudy*, 25 F. Supp. 912 (W.D. Ky. 1939) (assignment); *In re Hess*, 1 F.2d 342 (W.D. Pa. 1923) (same).

The partnership agreement may provide that the remaining partners shall purchase, or have an option to purchase, the interest of the deceased or retired partner. See *Murphy v. Murphy*, 217 Mass. 233, 104 N.E. 466 (1914); *cf. McKinnon v. McKinnon*, 56 Fed. 409 (8th Cir. 1893); *Harbster's Appeal*, 125 Pa. 1, 17 Atl. 204 (1889). Or it may simply provide that the executor of a deceased partner leave the decedent's interest in the business for a specified period. See *Wild v. Davenport*, 48 N.J.L. 129, 7 Atl. 295 (1886); *Stewart v. Robinson*, 115 N.Y. 328, 22 N.E. 160 (1889).

Consent may also be given by will of a deceased partner. The will may permit or direct the executor to continue the estate's investment position in the dissolved partner-

earnings or taking interest on his fund.<sup>3</sup> But when the remaining partners use his investment without consent, the withdrawing member may be able to obtain no more than interest.<sup>4</sup> Moreover, when the erstwhile partner or his personal representative finally decides to withdraw his holdings, creditors of the business often claim priority over him.<sup>5</sup> If the creditors loaned money before death or retirement of the firm member, their claims clearly outrank his.<sup>6</sup> And new creditors have precedence if they have not received proper notice.<sup>7</sup> But when new creditors have notice, priority apparently depends upon the withdrawing member's having consented to continued use of his funds.<sup>8</sup>

In the recent case of *Blut v. Katz*,<sup>9</sup> the New Jersey Supreme Court interpreted Section 42 of the Uniform Partnership Act, which deals with both the

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ship's continuing business rather than force a liquidation. See *In re Lough*, 182 Fed. 961 (2d Cir. 1910); *Kilhoffer v. Zeis*, 109 Misc. 553, 179 N.Y. Supp. 523 (Sup. Ct. 1919).

Either the will or the partnership agreement may provide for the introduction of a new partner as a representative of the deceased or retired partner. See *Andrews v. Stinson*, 254 Ill. 111, 98 N.E. 222 (1912) (will); *Matter of Marx*, 106 App. Div. 212, 94 N.Y. Supp. 151 (2d Dep't 1905) (agreement); *McGrath v. Cowen*, 57 Ohio St. 385, 49 N.E. 338 (1898). This is not the kind of consent here referred to, since in such a situation the successor partner's undisputed right to share in profits is grounded on ordinary partnership principles.

3. See notes 19 and 20 *infra*. For a complete discussion of the effects of various arrangements for continuation of a business after the death of a partner, see Fuller, *Partnership Agreements for Continuation of an Enterprise After the Death of a Partner*, 50 YALE L.J. 202 (1940). See also Adelman, *The Power to Carry on the Business of a Decedent*, 36 MICH. L. REV. 185, 186 (1937).

4. See text at note 16 *infra*.

5. See page 714 *infra*.

6. *In re Hess*, 1 F.2d 342 (W.D. Pa. 1923); *Adams & Co. v. Albert*, 155 N.Y. 356, 49 N.E. 929 (1898); *Kilhoffer v. Zeis*, 109 Misc. 555, 179 N.Y. Supp. 523 (Sup. Ct. 1919); see *Big Four Implement Co. v. Keyser*, 99 Kan. 8, 12-13, 161 Pac. 592, 594 (1916). To hold otherwise would be to allow such a retired or deceased partner to compete with his own creditors. Section 42 and 41(8) of the Uniform Partnership Act codify this priority. See note 11 *infra*.

7. Only legally sufficient notice to such creditors can terminate the apparent authority of the remaining partners to act for the old partnership and to thereby bind the retiring partner or the estate of the deceased partner. See, e.g., *Torvend v. Patterson*, 136 Cal. App. 120, 28 P.2d 413 (1933); *McNeil Co. v. Hamlet*, 213 Ill. App. 501 (1919); *Security State Bank v. Nelson*, 171 Minn. 332, 214 N.W. 51 (1927); *Schwartz Bros. & Co. v. Beacham*, 157 Miss. 93, 127 So. 689 (1930); *Kersch v. Machover*, 194 N.Y. Supp. 239 (Sup. Ct. 1922); UPA § 35; CRANE, *PARTNERSHIP* 428-42 (1952). At common law, the general rule is that no special notice is required upon dissolution by death of a partner. See, e.g., *National Union Bank of Maryland v. Hollingsworth*, 135 N.C. 556, 47 S.E. 618 (1904). However, § 35 of the Uniform Partnership Act provides that notice of most types of dissolution, including dissolution by death, must be given directly to those without actual knowledge who extended credit to the old partnership. New creditors who were not also creditors of the old partnership may be notified by newspaper publication.

8. See text at notes 27 and 30 *infra*.

9. 13 N.J. 374, 99 A.2d 785 (1953).

right of a former partner to share in the profits of a continued business and his relation to firm creditors.<sup>10</sup> In this case the remaining members of a manufacturing enterprise pursued the business without consent of either the deceased partner or his executrix. Section 42 gives a deceased or retired partner an "ordinary" creditor's right to "the profits attributable to the use of his right in the property of the dissolved partnership" when the business is continued with his consent.<sup>11</sup> The Act does not specifically deal with such part-

10. The Uniform Partnership Act has been adopted in the following states: Arkansas, 6 ARK. STATS. ANN. §§ 65-101-65-143 (1947); Colorado, COLO. STATS. ANN. c. 123, §§ 1-43 (1935); Delaware, 3 DEL. CODE ANN. tit. 6, §§ 1501-1543 (1953); Idaho, 9 IDAHO CODE §§ 53-301-53-343 (1937); Illinois, ILL. ANN. STATS. c. 106½, §§ 1-43 (Smith-Hurd, 1952); Maryland, 2 ANN. CODE MD. Art. 73A, §§ 1-43 (1951); Massachusetts, 3 ANN. LAWS MASS. c. 108A, §§ 1-44 (1946); Michigan, 14 MICH. STATS. ANN. §§ 20.1-20.43 (1937); Minnesota, 21 MINN. STATS. ANN. §§ 323.01-323.43 (1945); Montana, 4 REV. CODE MONT. §§ 63-101-63-606 (1947); Nebraska, REV. STATS. NEB. §§ 67-301-67-343 (1943); Nevada, NEV. COMP. LAWS §§ 5028-5028.43 (Supp. 1931-1941); New Jersey, N.J.S.A. §§ 42:1-1-42:1-43 (1940); New Mexico, 5 N.M. STATS. ANN. §§ 70-116-70-158 (Supp. 1951); New York, N.Y. PARTNERSHIP LAW §§ 1-74 (1948); North Carolina, GEN. STATS. N.C. §§ 59-31-59-73 (1950); Oregon, 1 ORE. REV. STATS. §§ 68.010-68.650 (1953); Pennsylvania, PA. STAT. ANN. tit. 59, §§ 1-105 (Purdon, 1930); South Dakota, 3 S.D. CODE §§ 49.0101-49.0615 (1939); Tennessee, 5 TENN. CODE ANN. §§ 7841-7882 (Williams, 1934); Utah, 5 UTAH CODE ANN. §§ 48-1-1-48-1-40 (1953); Vermont, VT. STATS. §§ 6062-6105 (1947); Virginia, 7 VA. CODE §§ 50-1-50-43 (1950); Washington, 4 REV. CODE WASH. §§ 25.04-25.08 (1952); Wisconsin, WIS. STATS. §§ 123.01-123.33 (1951); Wyoming, WYO. COMP. STATS. §§ 61-101-61-615 (1945).

11. Section 42 states: "When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38(2b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41(8) of this act."

Paragraphs 1 and 2 of § 41 deal with the continuation of a business after assignment by a retired partner of his interest to one or more of the new firm members. Paragraph 3 refers to such business continuation after consent by the personal representative of a deceased partner. Paragraph 5 and § 38(2b) cover pursuance of the business after a wrongful dissolution. And paragraph 6 of § 41 deals with continuance of the enterprise after the expulsion of a partner. It appears that this paragraph refers only to rightful expulsion, since if the partner were wrongfully expelled his claim to profits would not be governed by § 42. It would be measured instead under the original partnership agreement on the theory of a "continuing partnership." *Nuland v. Pruyn*, 99 Cal. App. 2d 603, 222 P.2d 261 (1950).

Section 41 was designed to insure creditors of the dissolved partnership of also being creditors of a new business arising from a continuation of the old partnership business without liquidation of its debts. See UPA § 41, Commissioner's Note. Under common

ner's rights absent consent.<sup>12</sup> Nevertheless, the executrix argued for a broad construction of Section 42 in demanding payment of her testator's investment and a portion of profits earned after his death.<sup>13</sup> The New Jersey court reasoned that under this section the *quid pro quo* of a share in profits is the subjection of the retired or deceased partner's interest to the risk of new creditors' claims.<sup>14</sup> Since the court believed that consenting partners alone assume this risk,<sup>15</sup> it granted only the value of the non-consenting partner's investment plus interest to his executrix.<sup>16</sup>

law there is danger that such creditors might be considered merely personal creditors of the old partners. However, a promise to pay such old creditors is often implied. See Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 634-6 (1915).

12. Only paragraphs 1, 2 and 3 of § 41 deal with retiring or deceased partners, and consent to continuation is required in these two situations. See note 11 *supra*.

13. She could have requested interest on the value of her testator's investment, since § 42 follows the common law by giving the option of receiving such interest instead of profits. *E.g.*, *Kimball v. Baxter*, 67 Cal. App. 635, 228 Pac. 381 (1924); *In re McMillan's Estate*, 38 N.M. 347, 33 P.2d 369 (1934); *Brown's Appeal*, 89 Pa. 139 (1879). The purpose of this option is to place the risk of loss upon the partner continuing the business. See *In re Eisenlohr's Estate*, 258 Pa. 431, 435, 102 Atl. 115, 116 (1917). Presumably the enterprise was quite profitable in *Blut*, and hence a share in profits was more desirable to the executrix.

14. *Blut v. Katz*, 13 N.J. 374, 379-80, 99 A.2d 785, 787-8 (1953). An alternative ground for the decision appears to be the theory that the profits involved were due mainly to the "skill, time, and diligence of the remaining partners." *Id.* at 381, 99 A.2d at 788. There is some support for this principle. See note 19 *infra*. However, since no evidence was introduced indicating otherwise, presumably the profits arose from the sale of hats manufactured by the partnership. And it is difficult not to conclude that one substantial source of these profits was the deceased partner's interest in the physical assets of the partnership. The alternative argument appears even less tenable in view of the court's decision that the executrix was entitled to a sum representing the decedent's interest in good will at the time of dissolution. The value of the good will was measured, at least in part, by the profit-making potential of the business. See *id.* at 383, 99 A.2d at 789. Hence it is somewhat inconsistent to conclude that the decedent's interest in good will did not contribute substantially to the profits earned after dissolution.

15. *Id.* at 379-80, 99 A.2d at 787-8. One premise of the decision seems to be that § 42 is limited to those fact situations enumerated in § 41. See *id.* at 380, 99 A.2d at 787-8. Accordingly, the New Jersey court would probably not require consent as a condition precedent in the case of a partner wrongfully causing a dissolution or a partner rightfully expelled from a partnership. These cases are covered by paragraphs 5 and 6 of § 41, which do not mention consent. See note 11 *supra*. But it is very doubtful that the interest of such non-consenting partners could be held liable to the claims of new creditors who had notice of dissolution. Yet they are clearly entitled to share in profits under § 42.

16. The court could have held the claim for profits valid and still have limited its extent. A large share of the profits could have been allotted to the continuing partners as "reasonable compensation." See *Tucker v. Tucker*, 370 Pa. 8, 87 A.2d 650 (1952) (alternative holding); *Bracht v. Connell*, 313 Pa. 397, 170 Atl. 297 (1933). Furthermore, the right to share in profits could have been confined to the nine months following dissolution, since at the end of that period the surviving partners, with the consent of the executrix, deposited in court a sum approximately sufficient to cover her claim. At common law the setting aside of a fund equal to the value of the former partner's interest has been

This interpretation of Section 42 is both unprecedented and undesirable.<sup>17</sup> Without a clear legislative mandate,<sup>18</sup> the New Jersey construction discards the common law doctrine under which a former partner normally receives profits or interest at his option whether the business is continued with or without consent.<sup>19</sup> All other courts considering Section 42 have construed

held to terminate the right to share in any profits subsequently earned, apparently on the theory that there can be no unjust enrichment if the property is not used by the surviving partner. *In re Maloney's Estate*, 233 Pa. 614, 82 Atl. 958 (1912). And in construing § 42 a court has treated the consent of the claimant to a setting aside of such a sum as an election by the claimant to take interest rather than profits. *Underdown v Underdown*, 279 Pa. 482, 124 Atl. 159 (1924).

17. There are no cases interpreting § 42 which support the "exposure to risk" theory of *Blut*, see note 20 *infra*. And only one common law decision states the principle. See *Taylor v. Hutchinson*, 25 Gratt. 536 (Va. 1874). This holding is just as readily explicable under the unjust enrichment theory, however, since at the date of dissolution the claimant was indebted to the partnership to such an extent that he had no valuable partnership interest which might be used to earn profits.

18. While there is justification in the language of § 42 for deciding that it was not meant to apply to non-consent situations, see note 11 *supra*, there is little justification for interpolating the word "only" into the section to make it read: "Only [W]hen . . . the business is continued under any of the conditions set forth in § 41. . . ." Such an interpretation is in derogation of the well-established common law right to share in profits in non-consent situations, see note 19 *infra*, and an interpretation in accord with the common law is to be preferred unless a contrary construction is compelled by unambiguous language. See, e.g., *Martin v. Federal Surety Co.*, 58 F.2d 79 (8th Cir. 1932); *Cox v. St. Anthony Bank & T. Co.*, 41 Idaho 776, 242 Pac. 785 (1925); *Palmer v. Sumner*, 133 Me. 337, 177 Atl. 711 (1935).

19. E.g., *Ruppe v. Utter*, 76 Cal. App. 19, 243 Pac. 715 (1925) (no consent); *Drapkin v. Klebanoff*, 5 N.J. Misc. 531, 137 Atl. 432 (Ch. 1927) (same); *Brown's Appeal*, 89 Pa. 139 (1879) (consent); see also *Philips v. Reeder*, 18 N.J. Eq. 95 (1855).

The extent of the former partner's claim to profits is measured by the share of profits due to utilization of his property. *King v. Leighton*, 100 N.Y. 386, 3 N.E. 594 (1885) (profits due to completion of contract after dissolution); *Wood v. Wood*, 312 Pa. 374, 167 Atl. 600 (1933). Thus if the profits are due to the skill and effort of the continuing partner, the former partner may not share in them. *Laterra v. Laterra*, 134 N.J. Eq. 162, 34 A.2d 289 (1943) (chicken-selling business). And if the former partner had no substantial interest in partnership assets at the time of dissolution, he will have no claim to profits subsequently earned by the continuing partners. *Herren v. Harris*, 201 Ala. 577, 78 So. 921 (1918) (cotton brokerage business); *Hall v. Watson*, 73 Cal. App. 2d 735, 167 P.2d 210 (1946) (former partner in debt to partnership at dissolution); *Smith v. Smith*, 51 La. Ann. 72, 24 So. 618 (1898) (insurance agency). Where this is not the case, if the business has been continued with consent the continuing partner may claim a share of the profits as compensation. *Littlefield v. Gorton*, 65 R.I. 390, 14 A.2d 682 (1940).

In cases of continuation with consent, there may be an agreement eliminating the option of taking interest rather than profits and delimiting the former partner's share of profits. No larger share of profits may then be claimed. *In re Mamaux's Estate*, 274 Pa. 533, 118 Atl. 441 (1922).

Another common law exception denies the former partner's claim to profits or interest if the delay in a settlement of accounts was due to his unreasonable demands. *Philips*

it to reach this common law result,<sup>20</sup> which is designed to prevent unjust enrichment of remaining firm members.<sup>21</sup> Furthermore, denying profits to non-consenting former partners would enable remaining partners to gain through a breach of their fiduciary duty to wind up partnership affairs.<sup>22</sup> Since partners wrongfully causing dissolution are clearly entitled to profits under the Act,<sup>23</sup> they have, in New Jersey, rights superior to those of a retired partner whose property has been used against his will.

But the interpretation of Section 42 adopted by the other jurisdictions solves one problem by creating another. While it avoids unjust enrichment, it will lead to difficulty when liquidation of the continued business engenders conflict between the claims of former partners and new creditors. Section 42 gives every claimant under it the same status—that of an “ordinary creditor.”<sup>24</sup> Accepted principles of statutory interpretation would impart a constant meaning to this term.<sup>25</sup> Hence, because Section 42 claimants under the majority doctrine include both consenting and non-consenting former partners, conformity with these principles would result in assigning both classes the same creditor position as against new creditors. Such a uniform definition would be inequitable and unprecedented.<sup>26</sup>

It would be unfair to non-consenting former partners to define “ordinary creditor” as one on par with or inferior to new firm creditors. There is no reason for subjecting such a partner’s interest to payment of creditors who had notice of dissolution and therefore had no reason to rely on these assets to satisfy their claims. The common law avoids this result by making the

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v. Reeder, *supra* (alternative holding, denies profits, grants interest); Randolph v. Inman, 172 Ill. 575, 50 N.E. 104 (1898) (denies both interest and profits).

And the continuing partner’s exercise of a partnership agreement option to purchase the former partner’s interest may cut off the right to share in profits subsequently earned. Hull v. Cartledge, 18 App. Div. 54, 45 N.Y. Supp. 450 (2d Dep’t 1897); Harbster’s Appeal, 125 Pa. 1, 17 Atl. 204 (1889). See note 2 *supra*.

20. Vanderplow v. Fredricks, 321 Mich. 483, 32 N.W.2d 718 (1948) (non-consenting former partner after dissolution by notice); M. & C. Creditors Corp. v. Pratt, 172 Misc. 695, 17 N.Y.S.2d 240 (Sup. Ct.), *aff’d without opinion*, 255 App. Div. 838, 7 N.Y.S.2d 662 (1st Dep’t 1938), *aff’d without opinion*, 281 N.Y. 804, 24 N.E.2d 482 (1939) (no consent by personal representative); Spivak v. Bronstein, 367 Pa. 70, 79 A.2d 205 (1951) (ineffective consent by executrix); Bracht v. Connell, 313 Pa. 397, 170 Atl. 297 (1933) (non-consenting former partner after dissolution by consent); see Moseley v. Moseley, 196 F.2d 663, 666 (9th Cir. 1952); Cahill v. Haff, 248 N.Y. 377, 380, 162 N.E. 288, 289 (1928).

21. See, e.g., Ruppe v. Utter, 76 Cal. App. 19, 25, 243 Pac. 715, 717 (1925); Fleming v. Fleming, 211 Idaho 1251, 1271-2, 230 N.W. 359, 368 (1930); Losch v. Marcin, 251 N.Y. 402, 410, 167 N.E. 514, 516 (1929); King v. Leighton, 100 N.Y. 386, 393, 3 N.E. 594, 597 (1885); *In re Eisenlohr’s Estate*, 258 Pa. 431, 437, 102 Atl. 115, 116 (1917).

22. See note 1 *supra*.

23. UPA §§ 41(5) and 42. See note 11 *supra*.

24. See note 11 *supra*.

25. See, e.g., Helvering v. Credit Alliance Corp., 316 U.S. 107, 111 (1942); United States v. Raynor, 302 U.S. 540, 547 (1938).

26. See pages 714-15 *infra*.

claims of non-consenting retired or deceased partners superior to those of such creditors.<sup>27</sup>

On the other hand, whenever a consenting former partner is involved, it would be unfair to new business creditors to define "ordinary creditor" as one superior to them.<sup>28</sup> The common law with good reason regards a partner who has assigned his interest to only one of the remaining partners as a personal creditor inferior to all business creditors, since he was willing to rely solely upon the individual credit of that firm member.<sup>29</sup> And even if the erstwhile partner assigns his interest to the firm as a whole, an intent to submit his investment to the risks of the new business may be reasonably inferred. One line of common law cases adopts this position by making such consenting former partners inferior to new creditors.<sup>30</sup> And, in any event, no court has gone further than putting consenting partners and new creditors on par.<sup>31</sup>

Thus both the New Jersey and the majority rules are unsatisfactory, though for different reasons. The New Jersey decision denies Section 42 "profit-option" rights to non-consenting former partners but grants them to consenting former partners. Accordingly, only the latter need be termed "ordinary

27. *Hurst v. Smith*, 227 Ala. 664, 151 So. 825 (1933); *Giddens v. Reddoch*, 207 Ala. 297, 92 So. 848 (1921). Such partners have a lien on partnership property. See *Reynolds v. Roberts*, 119 Kan. 281, 237 Pac. 931 (1925); *Burk v. Burk*, 128 S.W. 315 (Ct. App. Ky. 1910).

28. This definition has already been given the term "ordinary creditor" in a case involving a claim under § 42 to share in profits made by continuation of the business without consent. *Froess v. Froess*, 284 Pa. 369, 131 Atl. 276 (1925); *id.*, 289 Pa. 69, 137 Atl. 124 (1927). See *CRANE, PARTNERSHIP* 463 n.43 (1952); 74 U. OF PA. L. REV. 512 (1926).

29. The question of the partner's reliance is one of intent to be ascertained from facts such as the wording of the continuation agreement and the treatment of the debt on the books of the business. *In re Strauss*, 9 F.2d 792 (7th Cir. 1925); *Reed v. Dunlop*, 280 Fed. 380 (8th Cir. 1922); *In re Lough*, 182 Fed. 961 (2d Cir. 1910); *In re Hess*, 1 F.2d 342 (W.D. Pa. 1923). *But see Hoyt v. Sprague*, 103 U.S. 613, 628 (1880); *In re Rudy*, 25 F. Supp. 912 (W.D. Ky. 1939) *semble*.

30. *Hoyt v. Sprague*, 103 U.S. 613 (1880); *Big Four Implement Co. v. Keyser*, 99 Kan. 8, 161 Pac. 592 (1916); *Adams & Co. v. Albert*, 155 N.Y. 356, 49 N.E. 929 (1893); *Kilhoffer v. Zeis*, 109 Misc. 555, 179 N.Y. Supp. 523 (Sup. Ct. 1919).

But the presumption is that a deceased partner did not intend his entire estate to be subject to the risks of a continued business, even though he consented to its continuation without liquidation. New creditors, therefore, generally may attack only the value of his old partnership interest. *Smith v. Ayer*, 101 U.S. 320 (1879); *Burwell v. Mandeville's Ex'r*, 2 How. 559 (U.S. 1844); *Stewart v. Robinson*, 115 N.Y. 328, 22 N.E. 160 (1889); *Kilhoffer v. Zeis*, *supra*; *Wilcox v. Derickson*, 168 Pa. 331, 31 Atl. 1080 (1895). The presumption may be rebutted by a clear indication of an intent to subject the entire estate to claims of new creditors. *Accord*, *Willis v. Sharp*, 113 N.Y. 586, 21 N.E. 705 (1889) (executor carried on individual proprietorship).

31. It has been held that a former partner's claim will be on par with those of new creditors if the former partner has not led such creditors to reasonably believe that their claims could be satisfied from his investment. *In re Lough*, 182 Fed. 961 (2d Cir. 1910) (appeared on books as loan upon which interest was paid); *accord*, *Smith v. Ayer*, 101 U.S. 320 (1879).

creditors." Therefore the application of the New Jersey rule would not involve assigning the same creditor position to both consenting and non-consenting former partners. However, the New Jersey rule does prevent the former partner's participation in profits earned by the unauthorized use of his property. The majority rule avoids this difficulty, but threatens to work injustice to either the former partner in non-consent cases or to creditors of the new business in consent situations, depending upon the definition of "ordinary creditor" adopted.<sup>32</sup>

The disadvantages of both positions can be avoided by applying Section 42 only when the former partner consents to a continuation of the business and dealing with non-consenting deceased or retired partners under the common law.<sup>33</sup> The clear import of the words of Section 42 suggests this approach.<sup>34</sup> Moreover, it appears to have some judicial support.<sup>35</sup> While eliminating the danger of unjust enrichment of the remaining partners, it would at the same time cope with the creditor problem by placing non-consenting deceased or retired partners outside the scope of Section 42.<sup>36</sup> Thus the term "ordinary creditor" would refer only to consenting former partners. This would avoid giving such partners unwarranted preference over new firm creditors.<sup>37</sup> And such interpretation of Section 42 would also grant non-consenting partners their deserved priority under the common law.

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32. It might be possible for the Pennsylvania court, which has already interpreted "ordinary creditor" as meaning one superior to new firm creditors, see note 28 *supra*, to avoid difficulty in many future cases involving consenting former partners by holding them estopped from claiming such advantage. It seems probable that facts amounting to an estoppel might be present in many such cases. See note 31 *supra*.

33. Section 5 of the Uniform Partnership Act provides: "In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern."

34. See note 11 *supra*.

It would be possible for a court to interpret "ordinary creditor" as one subordinate to new creditors if the business was continued with consent, and superior to new creditors if the business was continued without consent. This, in effect, would be rendering the term "ordinary" meaningless by robbing it of any fixed definition. See text at note 25 *supra*.

35. See *Sibert v. Shaver*, 111 Cal. App. 2d 833, 245 P.2d 514 (1952); *Losch v. Marcin*, 251 N.Y. 402, 167 N.E. 514 (1929). Both cases granted claims of the estates of deceased partners to a share of the profits made by continuation of a dissolved partnership's business without consent. Neither case mentions § 42, and yet the Uniform Partnership Act was in effect in both states. CAL. CIV. CODE §§ 2395-439 (Deering, 1941) (repealed, 1949); N.Y. PARTNERSHIP LAW §§ 1-78 (1948). See also, *Blut v. Katz*, 13 N.J. 374, 384-5, 99 A.2d 785, 790 (1953) (partial dissent by Chief Justice Vanderbilt and Justice Heher).

36. The English statute avoids the difficulties involved in § 42 by simply codifying the entire common law doctrine. Thus, there is no limitation of the statute to cases of continuation with consent and no reference to the creditor status of the former partner. Partnership Act, 1890, 53 & 54 Vict., c. 39. See *Manley v. Sartori*, 1 Ch. 157 (1927).

37. The resulting inferiority of such partners would be in accord with the intent of the drafters of the statute. See UPA § 41, Commissioner's Note.